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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LARRY HERNANDEZ,
12 Petitioner,
13 v.
14 RAYMOND LEORA, Sheriff,
15 Imperial County,
16 Respondent.

Case No.: 16cv2460-AJB(JMA)

**ORDER DENYING
PETITIONER'S MOTION FOR
APPOINTMENT OF COUNSEL
[DOC. NO. 25] & RESETTING
DEADLINE FOR PETITIONER
TO FILE TRAVERSE**

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18 Petitioner has filed a motion for appointment of counsel that is currently
19 pending before the Court. [Doc. No. 25.] Petitioner requests counsel be
20 appointed for him because he cannot afford to hire an attorney and he does "not
21 know or understand the process that is occurring." [Doc. No.7, p. 37 of 38; Doc.
22 No. 25, p. 1 of 2.] He states, "I got found incompetent to stand trial. I still am."
23 [Doc. No. 25, p. 1 of 2.] Petitioner contends the Court should conduct an
24 evidentiary hearing regarding his mental competency. [*Id.*] Petitioner does not
25 submit a declaration under penalty of perjury in support of his motion, nor does
26 he attach any documentation to support the granting of the appointment.

27 On April 11, 2017, the Court issued an order informing Petitioner he had
28 not made specific allegations or submitted "substantial evidence" of

1 incompetence, which is required to warrant the Court conducting a competency
2 hearing. [Doc. No. 31, p. 2, applying *Allen v. Calderon*, 408 F.3d 1150 (9th Cir.
3 2005)] Ordinarily under these circumstances a motion for appointment of counsel
4 would be denied, but because Respondent had previously informed the Court the
5 Imperial County Superior Court remanded Petitioner to Atascadero State
6 Hospital in November 2016, for evaluation of his mental competence in
7 connection with sentencing proceedings, the Court informed Petitioner of the
8 shortcomings of his motion for appointment of counsel and ordered he
9 supplement the record. [*Id.*, p. 3; See also Doc. No. 17, Ex. A; Doc. No. 31.]
10 Respondent was also given a deadline to respond to Petitioner's supplemental
11 filing.

12 Petitioner's April 25, 2017 deadline to file his Additional Evidence of
13 Current Incompetence has since passed and no supplemental filing from him has
14 been received by the Court. Respondent, however, has submitted briefing and a
15 report by Atascadero State Hospital regarding the evaluation of Petitioner's
16 mental health that was prepared at the direction of Imperial County Superior
17 Court. [Doc. No. 39 and 36.]

18 The Sixth Amendment right to counsel does not extend to federal habeas
19 corpus actions by state prisoners. *McClesky v. Zant*, 499 U.S. 467, 495 (1991);
20 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert denied*, 481 U.S.
21 1023 (1987); *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986), *cert.*
22 *denied*, 479 U.S. 867 (1986). Under 18 U.S.C. § 3006A(a)(2)(B), however,
23 financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C. § 2254
24 may obtain representation whenever a magistrate judge or the district court
25 "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2),
26 (a)(2)(B); *Terrovona v. Kincheloe*, 912 F.2d 1176, 1181 (9th Cir. 1990), *cert.*
27 *denied*, 499 U.S. 979 (1991).

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1 The interests of justice can also require appointment of counsel when the
2 Court conducts an evidentiary hearing on the Petition. *Terrovona*, 912 F.2d at
3 1177; *Knaubert*, 791 F.2d at 728; *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir.
4 1994); Rule 8(c), 28 U.S.C. § 2254. Ninth Circuit precedent mandates that when
5 a petitioner submits “substantial evidence” of his incompetence, the District Court
6 should hold a competency hearing to determine whether a petitioner is
7 “competent under an appropriate standard for habeas petitioners.” *Allen*, 408
8 F.3d at 1153-54. Here, despite having multiple opportunities to do so, Petitioner
9 has not submitted any evidence of his incompetence. In fact, the only evidence of
10 Petitioner’s mental competency are the records from Atascadero State Hospital’s
11 evaluation of Petitioner’s mental health. The thirteen page Atascadero State
12 Hospital report, which was prepared on December 30, 2016, and accompanying
13 Certification of Mental Competency, which were filed with the Imperial County
14 Superior Court, document the 90 day evaluation of Respondent and conclude he
15 is competent to stand trial. [Doc. No. 38.] Thus, there is no indication that an
16 evidentiary hearing is necessary.

17 The appointment of counsel is discretionary when no evidentiary hearing is
18 necessary. *Terrovona*, 912 F.2d at 1177; *Knaubert*, 791 F.2d at 728; *Abdullah*,
19 18 F.3d at 573. In the Ninth Circuit, “[i]ndigent state prisoners applying for
20 habeas relief are not entitled to appointed counsel unless the circumstances of a
21 particular case indicate that appointed counsel is necessary to prevent due
22 process violations.” *Chaney*, 801 F.2d at 1196. A due process violation may
23 occur in the absence of counsel if the issues involved are too complex for the
24 petitioner. *Id.* In addition, the appointment of counsel may be necessary if the
25 petitioner is of such limited education as to be incapable of presenting his claims.
26 *Hawkins v. Bennett*, 423 F.2d 948, 950 (8th Cir. 1970). When the issues
27 involved in a section 2254 habeas action can be properly resolved on the basis
28 of the state court record, a district court does not abuse its discretion in denying a

1 motion for appointment of counsel. *Travis v. Lockhart*, 787 F.2d 409, 411 (8th
2 Cir. 1986).

3 In the instant case, Petitioner has sufficiently represented himself to date.
4 It appears he has a good grasp of this case and the legal issues involved. The
5 First Amended Petition was pled sufficiently to warrant this Court's issuance of
6 an Order to Respond, which directed Respondent to file an Answer or other
7 responsive pleading. [Doc. No. 8.]

8 Furthermore, the issues raised in the First Amended Petition are not
9 complex. The First Amended Petition raises a single claim, which was
10 addressed by the California courts in the direct appeal process. Respondent
11 has provided the Court with the state court records relevant to the determination
12 of the issues presented. [Doc. No. 16.] At this stage of the proceedings,
13 therefore, it appears the Court will be able to properly resolve the issues
14 presented on the basis of the state court record. Under such circumstances, a
15 district court does not abuse its discretion in denying a state prisoner's request
16 for appointment of counsel because it is simply not warranted by the interests of
17 justice. See *LaMere v. Risley*, 827 F.2d 622, (9th Cir. 1987).

18 Based on the foregoing, the Court finds that the interests of justice do not
19 require the appointment of counsel. Petitioner's motion for appointment of
20 counsel is, therefore, **DENIED**

21 As the Court previously indicated when it granted Petitioner's motion for
22 extension of time to file his Traverse, the deadline for Petitioner to file his
23 Traverse would be reset by the Court after a determination was made regarding
24 whether a competency hearing should be held. As the Court has concluded a

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competency hearing is not warranted, the deadline for Petitioner to file a Traverse is hereby reset for **July 7, 2017**.

IT IS SO ORDERED.

Dated: June 7, 2017



Honorable Jan M. Adler
United States Magistrate Judge